> "[U]ltimate facts as to the probable future adverse consequences can only be determined by putting with those undisputed facts other facts within the experts' knowledge to reach the conclusion as to the consequences."

Although not present in the instant matter, considerable time has been devoted to appellate review which is concluded by remanding the matter for the purpose of establishing an adequate agency record. This could be better devoted to an original, properly conducted trial on predefined, limited issues.

The interest of the *amici* is not to prevent disclosure. It is merely to insure that on the rare occasions when an individual's objections to disclosure are not respected by the federal agency holding his property that he will receive an impartial hearing prior to disclosure.

Persons in the position of the *amici* normally will not be able to incur the economic burden of a *de novo* trial in any but the most potentially damaging situations. However, the availability of this remedy is infinitely preferable to judicial review of agency deliberation under the controlling standard of arbitrary abuse of agency discretion.

In the instant matter, minimal opportunity was afforded to a petitioner which has a legal staff as effective as that of Chrysler Corporation to have a substantial impact in the agency's deliberations. Even Chrysler was not able to present evidence in its own behalf within this limited period. A full ten-day period is rarely afforded by an agency to a submitter. The time must include that needed for notification as well as communication of a decision to all parties on or before the final day. The persons comprising the membership of the *amici* probably cannot. These people do not normally retain house counsel and could do little more then petition the district court to enjoin the proposed disclosure within a period as short as this one. To further

circumscribe their remedies by vesting exclusive jurisdiction in agency personnel whose concern is avoiding legal repercussions from vindictive members of the public compounds this unfairness.

Finally, although this is the era of increasingly greater regulation by government, its concomitant is increased reliance on voluntary submissions of needed information to the regulator. Regulatory agencies depend on this material and will be handicapped in their activities if submitters are determined to disclose only minimal information.

The decision of the Third Circuit in *Chrysler v. Schlesinger* does not encourage confidence in the government's ability to administer internally the Freedom of Information Act. To limit judicial relief to a review of the agency's decision regarded in the light of a legal standard of arbitrary and capricious abuse of discretion permits the controlling decision to be made by the promulgator of the regulations. Joined with the present circumstances in which diverse agencies have promulgated individualized regulations, it would seem that compliance with an internal regulation should not be the pivotal factor controlling disclosure. The alternative is *de novo* judicial proceedings. It is inappropriate for citizens to have exclusive recourse to the same source for both the prevailing law and the controlling decision.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and the matter remanded to the court of appeals for entry of judgment denying the petition for review.

Respectfully submitted,

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June 5, 1978

disclosure can be made under the agency's regulations remains. In the instant case, the vagueness of the agency regulation facilitated the administrative determination that disclosure would be in conformity with it. These criteria encourage disinterested, non-technically educated government employees to make expensive, expansive decisions based upon bland readings of legalistic criteria rather than inquiry into the results of this disclosure upon the interests of the submitter, the government and the public. The requester remains anonymous, thus, his interest cannot be considered a specific part of the equation. It is noteworthy that in the *Chrysler* case, the requester never intervened or otherwise participated in the proceedings. 565 F. 2d at 1175 n. 2.

An additional factor commented upon by the Fourth Circuit in *Westinghouse Corp. v. Schlesinger,* 542 F. 2d at 1213, is appropriate for the Court's consideration. The present positive attitude toward open government and general public revulsion against secrecy provide agency personnel with an implicit, predetermined psychological set to release as much information as possible and to avoid being condemmed for failures to disclose. Coupled with the admittedly small agency stake in the results of disclosure, a synergistic effect results in compliance with requests for information as rapidly as possible and the avoidance of legalistic delays.

Finally decisional deadlines as short as ten days discourage attention to traditional protections such as notice and an opportunity to protest being granted to submitters.

Government personnel have to decide under time pressures which make it difficult to regard their final decision as one made with the interests of all parties under active consideration. The interest of agency personnel is to avoid violating either the Freedom of Information Act, resulting in a contempt citation, or 18 U.S.C. §1905, resulting in criminal proceedings. Under the present circumstances, the sanctions accompanying

unauthorized disclosure are more attractive than those of nondisclosure to the deciding employee. Therefore, it is unlikely that the interest of those persons represented by the *amici* will be considered fully when the exemptions from disclosure sections of the FOIA are construed as tightly and narrowly as they have been in recent decisions.

III.

Trial *de novo* is the only effective protection for submitters of confidential information of which disclosure is sought by a Freedom of Information Act request.

If the Freedom of Information Act created a protection, "it carries with it an implied right in a private party to invoke the equity powers of the court to assure him that protection. It matters not that the statute does not in express terms afford him that right." *Westinghouse Electric Co. v. Schlesinger,* 542 F. 2d at 1211 *citing Renegotiation Board v. Bannercraft Co.,* 415 U.S. 1 (1974). Here, the court concluded basic fairness requires a trial *de novo* for submitters as well as requesters of information under the Freedom of Information Act.

The District of Columbia Circuit has been consistent in holding that agency determinations are compelling evidence of whether or not disclosure should have been made, but if appealed, "carry no more weight than those of any other litigant. . . ." *Mead Data Cent., Inc. v. United States Dept. of Air Force,* 556 F.2d 242, 251 (D.C. Cir. 1977).

The necessity for resolving conflicts by testimony and cross examination was acknowledged in *Sears, Roebuck & Co. v. General Services Admin.,* 553 F. 2d 1378, 1382 (D.C. Cir. 1977), *cert. denied,* ____ U.S. ____ (1977).

II.

Agency personnel have no substantial interest in refusing to disclose information requested under the Freedom of Information Act.

It is universally recognized that a federal agency may have little interest in retaining the confidential status of material. However, this exemption was not included within the FOIA for its benefit. *Continental Oil Co. v. Federal Power Com'n.*, 519 F. 2d 31, 35 (5th Cir. 1975). If no independent opportunity is afforded to the submitter of information to protect judicially his interest in continued confidentiality, it is unlikely that the recipient agency will do it for him. *Westinghouse Elec. Corp. v. Schlesinger*, 542 F. 2d 1190, 1213 (4th Cir. 1976), *cert. denied sub. nom. Brown v. Westinghouse Elec. Corp.*, 431 U.S. 924 (1977); *Union Oil Co. of California v. Federal Power Com'n.*, 542 F. 2d 1036, 1045 (9th Cir. 1976); *Instrument Systems Corp. v. United States*, 546 F. 2d 357, 359, 360 (Ct. Cl. 1976).

The *Westinghouse* court found alternative arguments to be "contrary to the whole thrust of the FOIA," holding that the "'caprice of executive officers'" so likely that the court cannot abdicate control over the evidence to such persons. 542 F. 2d at 1215.

Lack of interest by agency personnel has been regarded approvingly as a positive factor to ensure appropriate administration of the Freedom of Information Act. To the contrary, it is the suggestion of the *amici* that this lack of interest coupled with the lack of specialized knowledge needed to understand the potential value of technical information submitted to the government by those represented by the *amici* works to the detriment of that segment of the public whose interest is better served by maintaining the confidentiality of their work product. Counsel for the agency who will ultimately

decide the issue "has little or no incentive to protect the secrets of business community." 30 Bus. Law. at 1134.

Appropriate notification procedures are frequently neither provided nor utilized by agency personnel. "[I]n the majority of situations, notification remains an informal courtesy." 6 Loy. Chi. L.J. at 610. If a submitter is to articulate objections he must be given an opportunity to formalize and present them as affidavits, briefs, or oral argument. If standard procedures respectful of the exemptions embodied in this statute were binding on federal agencies, the number of occasions in which a district court would have to intervene would be insubstantial.

The contents of the regulations controlling the administration of the Freedom of Information Act are drafted by the agency personnel in control of confidential information. Controversies arising under the Freedom of Information Act disclose informal procedures seemingly calculated to disable the submitter from the ability to react appropriately and timely. Conversely, the agency's failures to respect those interests may be counted by the numerous cases reversing and remanding its decisions for additional internal proceedings needed to procure a complete record for judicial use.

When an agency has codified a regulation, worded as that under consideration here, acceding to any request for information can easily be construed as one which "furthers the public interest." [41 C.F.R. §60-40.2(a)]. This does not protect the public nor those persons more intimately involved, the owners of the information.

The *Chrysler* court viewed the Freedom of Information Act as requiring an agency to first ascertain whether or not information submitted to the government should remain confidential by determining if it is protected by a nondisclosure exemption. Even when so protected, an additional and in the view of the *amici* unnecessary inquiry of whether or not

> "When a large investment in research cannot be brought to commercial fruition, because Government has disclosed its once-confidential innovation to competitors, the consumer pays for the loss in higher prices without corresponding benefit — and further research is deterred since the Government may jeopardize its economic returns from a premature economic disclosure." O'Reilly, *Government Disclosure of Private Secrets under the Freedom of Information Act*, 30 Bus. Law. 1125, 1146 (1974-5).

It is essential that a distinction be drawn protecting both the rights of the general public to secure knowledge of the operation of their government, the legitimate objective of the Freedom of Information Act, and those of parties who must furnish knowledge to their government in order to continue their private activities, a goal of equal magnitude within the same statute.

In the latter group are found not only corporations that cannot exist without these submissions but a multitude of private persons, many of whom are represented by the *amici*, who must also reply on various governmental activities which obligate them in turn to furnish information.

The general public has no claim to a business secret. "[P]rivately generated proprietary information [has] value to the supplier . . . based upon secrecy." Note, *Would Macy's Tell Gimbels: Government-Controlled Business Information and the Freedom of Information Act, Forward and Backwards*, 6 Loy. Chi. L.J. 594, 594 (1975).

Compelling reasons exist to afford protection to persons who have voluntarily disclosed such information as part of their responsibility in the dual role of scientist-citizen.

The inclusion of this exemption in the Freedom of Information Act reveals a "Congressional concern that the disclosure of certain information might injure interests in privacy or confidentiality which might be as important as the public's right of general access to agency information." *Chrysler Corporation v. Schlesinger*, 565 F. 2d 1172, 1184 (3rd Cir. 1977). Congressional history suggests that this protection had been granted. If it is to be destroyed, the authority for violating these individual rights should be mandated by Congress rather than the judiciary.

> order to secure the maximum amount of information. . . . *The wisdom of the balance struck by Congress is not open to judicial scrutiny." FAA Administrator v. Robinson,* 422 U.S. 255, 266, 267. (Emphasis added.)

Unfortunately judicial construction has added additional, unlegislated criteria to the definition of confidential information. It must not only be received in anticipation of the maintenance of its confidential nature but its disclosure must also be

> "likely to have either of the following effects:
>
> (1) to impair the Government's ability to obtain necessary information in the future; or
>
> (2) to cause substantial harm to the competitive position of the person from whom the information was obtained "

National Parks and Conservation Ass'n. v. Kleppe, 547 F.2d 673, 687 (D.C. Cir. 1976). See also, *Rural Housing Alliance v. United States Dept. of Agr.,* 498 F.2d 73, 78, 79 (D.C. Cir. 1974).

Although both factors are implicitedly present when disclosure of information which members of the *amici* previously submitted in the belief it would remain exempt from disclosure is threatened, its inchoate nature precludes a realistic appraisal of the potential damage to these interests by premature disclosure. Certainly, the first criterion is fulfilled as:

> "[a] person who knows that business information he provides to the government will be protected from disclosure is more likely to comply more freely and fully with statutory directives, thus easing the task of the government in collecting such information. If information cannot be protected, however, *a person is more likely to resist solicitation efforts by the government and*

> *to supply information reluctantly even when compelled to do so by statute." Developments under the Freedom of Information Act — 1974,* 1975 Duke L.J. 416, 444 (1975). (Emphasis added.)

In order for the most lucrative commercial application to be made of research activities performed by unincorporated individuals, maintenance of its results in secrecy until licensing or patenting is appropriate should be assured. The interests of private parties who may have devoted inordinate amounts of time in the expectation of eventual commercial application and financial remuneration should be protected. When this is not done, substantial competitive harm to the owner of the information, *National Parks* criterion two, has been assured.

In addition to fundamental considerations of morality and confidence in government, the irremediable injury done to the persons represented by the *amici* must be considered. *Westchester Gen. Hosp. Inc. v. Dept. of H.E.W.,* 434 F. Supp. 435 (M.D. Fla. 1977). The monetary value of partially completed research which is not yet focused on commercial use is impossible to appraise accurately. The formulator of technology may have only evolved a relatively small fragment of it. If it becomes public knowledge and is coupled with existent public or private research already performed by interested persons or competitors, the potential commercial injury is magnified. However, an accurate assessment of the financial damages cannot be computed at the time of the disclosure decision or at any specific later date.

The disclosure of privately financed and developed commercial secrets to an unidentified requester harms the general public in a diversity of ways which are equally difficult to evaluate monetarily. Certainly, these costs form a portion of eventual retail value.

persons who determined to disclose the information originally. Under these circumstances, the government cannot expect continued cooperation from citizens who can anticipate suffering adverse effects from unauthorized disclosures. The ability to judicially contest disclosures of a confidential matter in a trial *de novo* prior to its release should be assured submitters of information in confidence.

ARGUMENT

I.

The Freedom of Information Act protects from disclosure unlicensed and unpatented scientific information submitted to the federal government in confidence.

To balance the legitimate needs of government with those of the public in acquiring knowledge of the former's operations was a major objective of Congress in enacting and later amending the Freedom of Information Act. The rights of submitters of information were confined to the exemption from disclosure sections [5 U.S.C. §552(b)]. The interests of persons, including research scientists, desiring to protect their work product from public disclosure were considered by Congress in drafting the trade secret exemption which includes:

> "*scientific or manufacturing processes or developments* . . . . It would include information customarily subject to . . . privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. *It would also include information which was given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, when the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.*" H. Rep. No. 1497, 89th Congress, 2d Sess. 10 (1966). (Emphasis added.) See also, S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

The ability to preserve confidential information in this status was reinforced by Attorney-General Ramsey Clark's guide to its administration. Specifically, he found that the final two sentences, quoted herein, "underlie the protection afforded by this exemption to information given to the Government in confidence, whether or not involving commerce or finance." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act,* 20 Ad. L.R. 263, 302 (1967).

In the same document, the Attorney-General stated that the exemption described in 5 U.S.C. §552(b)(4) unconditionally protected "technical or scientific data submitted or other information submitted in or with an application for research grant or in or with a report while research is in progress." If these guidelines had been consistently reiterated by courts faced with the necessity of defining the scope of the exemption, there would be little need for this *amici* brief. This Court in an opinion by Chief Justice Burger, as recent as 1975, summarized the position of the judiciary when required to construe a Freedom of Information Act exemption:

> "Congress could not reasonably anticipate every situation in which a balance must tip in favor of nondisclosure as a means of ensuring that the *primary, or indeed sole,* source of essential information would continue to volunteer information needed. . . . The public interest is served by assuring a free flow of relevant information to the regulatory authorities. . . . Congress could appropriately conclude the public interest was better served by guaranteeing confidentiality in

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE COLLECTION AND DISCLOSURE OF BUSINESS SECRETS BY FEDERAL AGENCIES: AN OVERVIEW	4
A. Confidential Business Information Submitted to Federal Agencies	4
B. Use of the FOIA to Discover Competitors' Secrets	7
C. The Business Secrets Exemption	10
1. General Protection of Business Secrets	10
2. Legislative Purpose of Exemption 4	15
D. The Reverse FOIA Problem	18
E. The Reverse FOIA Cases	24
II. THE ISSUE OF WHETHER BUSINESS RECORDS ARE WITHIN EXEMPTION 4 MUST BE DETERMINED BY THE COURT DE NOVO	27
A. De Novo Determination Is an Essential Part of the Congressional Scheme	27
B. The Fallacy of the "Administrative Record"	28
C. De Novo Review Is Required Under the Administrative Procedure Act	32
D. The Congressional Purpose of Exemption 4 Requires a Right to a De Novo Determination	35

		Page
III.	BUSINESS SECRETS ADMITTEDLY WITHIN EXEMPTION 4 SHOULD NOT BE DISCLOSABLE AT THE DISCRETION OF AGENCY OFFICIALS	37
	A. Exemption 4 Forecloses Agency Discretion to Disclose Exempt Business Secrets	37
	B. Agency Officials Should Not Be Permitted to Engage in "Interest Balancing" Where Congress Has Already Performed That Function	40
IV.	BUSINESS SECRETS WITHIN 18 U.S.C. § 1905 MAY NOT BE DISCLOSED UNDER THE FOIA	46
	A. Section 1905 Is a Statute Within Exemption 3 of the FOIA	47
	B. Agency Regulations May Not Authorize Disclosure of Business Secrets Within Section 1905	48
CONCLUSION		51

TABLE OF AUTHORITIES

CASES	Page
American Sumatra Tobacco Corp. v. *SEC*, 93 F.2d 236 (D.C. Cir. 1937)	5
Babcock & Wilcox Co. v. *Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976)	10,32
Bi-Metallic Inv. Co. v. *State Board of Equalization*, 239 U.S. 441 (1915)	33
Burroughs Corp. v. *Schlesinger*, 403 F. Supp. 633 (E.D. Va. 1975)	10
Chandler v. *Roudebush*, 425 U.S. 840 (1976)	35,36
Charles River Park "A", Inc. v. *HUD*, 519 F.2d 935 (D.C. Cir. 1975)	24,25 41,49
Chrysler Corp v. *Schlesinger*, 412 F. Supp. 171 (D. Del. 1976), *vacated*, 565 F.2d 1172 (3rd Cir. 1977)	47
Chrysler Corp. v. *Schlesinger*, 565 F.2d 1172 (3rd Cir. 1977)	*passim*
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	32
Continental Oil Co. v. *FPC*, 519 F.2d 31 (5th Cir. 1975), *cert. den.*, 425 U.S. 971 (1976)	25
Dept. of Air Force v. *Rose*, 425 U.S. 352 (1976)	18,27,45
EPA v. *Mink*, 410 U.S. 73 (1973)	18,31,44
FAA v. *Robertson*, 422 U.S. 255 (1975)	41,44,47
FCC v. *Schreiber*, 329 F.2d 517 (9th Cir. 1964), *mod'fd and remanded*, 381 U.S. 279 (1965)	5
Fischer v. *Renegotiation Board*, 355 F. Supp. 1171 (D.D.C. 1973)	13
FTC v. *Texaco, Inc.*, 517 F.2d 137 (D.C. Cir. 1975)	5
General Dynamics Corp v. *Marshall*, No. 77-1192 (8th Cir. Feb. 14, 1978)	25,32,41
Goss v. *Lopez*, 419 U.S. 565 (1975)	33

	Page
Government Sales Consultants v. *GSA*, C.A. No. 77-1294 (D.D.C., filed July 22, 1977)	28
Grumman Aircraft Eng. Corp. v. *Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970)	22
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Int'l News Service v. *Associated Press*, 248 U.S. 215 (1918)	11,12
Kewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470 (1974)	10,11,35
Leeds & Northrup Co. v. *ERDA*, C.A. No. 77-1047 (D.D.C., filed June 16, 1977)	10
Londoner v. *Denver*, 210 U.S. 373 (1908)	33
Military Audit Project v. *Kettles*, C.A. No. 75-666 (D.D.C., May 17, 1976)	23
National Parks & Conservation Assn. v. *Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)	29
National Parks & Conservation Assn. v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974)	17,22
Open America v. *Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976)	21
Pennzoil Co. v. *FPC*, 534 F.2d 627 (5th Cir. 1976)	6,25 32,41
Pharmaceutical Mfrs' Assn. v. *Weinberger*, 411 F. Supp. 576 (D.D.C. 1976)	23
Planning Research Corp. v. *FTC*, 555 F.2d 970 (D.C. Cir. 1977)	24,25
Sears, Roebuck & Co. v. Eckerd, No. 77-1417 (7th Cir. Apr. 25, 1978)	25
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	Page
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USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976)	5,10 13,15
Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied, sub nom. Brown* v. *Westinghouse Electric Corp.*, 431 U.S. 924 (1977)	*passim*
STATUTES:	
5 U.S.C. § 301	3,47 48,50
5 U.S.C. § 552(a)(1)-(6)	18
5 U.S.C. § 552(a)(4)(B)	27
5 U.S.C. § 552(a)(4)(E)	19,31
5 U.S.C. § 552(a)(4)(F)	19,31
5 U.S.C. § 552(a)(6)(A)(i)	19,29
5 U.S.C. § 552(a)(6)(A)(ii)	19
5 U.S.C. § 552(a)(6)(B)	29
5 U.S.C. § 552(a)(6)(G)	19
5 U.S.C. § 552(b)	38
5 U.S.C. § 552(b)(1)	40
5 U.S.C. § 552(b)(2)	40
5 U.S.C. § 552(b)(3)	40,47,48
5 U.S.C. § 552(b)(4)	40
5 U.S.C. § 552(b)(5)	40
5 U.S.C. § 552(b)(6)	40,45
5 U.S.C. § 552(b)(7)	40
5 U.S.C. § 552(b)(8)	40
5 U.S.C. § 552(b)(9)	40
5 U.S.C. § 706	32,35
7 U.S.C. § 12	14

	Page
7 U.S.C. § 472	14
7 U.S.C. § 507	14
7 U.S.C. § 608d	14
7 U.S.C. § 955	14
7 U.S.C. § 2105(i)	14
13 U.S.C. § 214	14
15 U.S.C. § 45	5
15 U.S.C. § 46	5
15 U.S.C. § 49	5
15 U.S.C. § 176a	14
15 U.S.C. § 2055(a)(2)	14
15 U.S.C. § 2076	6
18 U.S.C. § 1905	*passim*
19 U.S.C. §§ 1330-1341	6
21 U.S.C. § 346a(f)	14
21 U.S.C. § 355(b)(1)-(4)	4
29 U.S.C. § 657(a)	6
42 U.S.C. § 242m(d)	14
42 U.S.C. § 2000e	36
42,U.S.C. § 2000e(8)(e)	14
42 U.S.C. § 2181e	14
Act of July 27, 1789	49
Act of Aug. 7, 1789	49
Act of Sept. 2, 1789	49
Act of Apr. 30, 1798	49
Internal Revenue Code § 6103(a)	14
Internal Revenue Code § 7213(a)(1)-(3)	14

REGULATIONS

Energy Research and Development Procurement Regulation 9-9.202-3, 41 C.F.R. § 9-9.202-3	13
Armed Services Procurement Regulation 3-507.1, 32 C.F.R. § 3-507.1	13

	Page
Armed Services Procurement Regulation 9-203(b), 32 C.F.R. § 9-203(b)	13
Department of Transportation Procurement Regulation 12-9.6302, 41 C.F.R. § 12-9.6302	13
NASA Procurement Regulation 9.203-1, 41 C.F.R. § 18-9.203-1	13
10 C.F.R. §§ 40.62-40.63	6
10 C.F.R. § 50.34	6
10 C.F.R. § 50.70	6
10 C.F.R. § 70.22	6
10 C.F.R. § 70.55	6
10 C.F.R. § 70.57	6
16 C.F.R. § 1115.7	6
32 C.F.R. § 7-602.23	5
32 C.F.R. § 7-103.18	5
32 C.F.R. § 18-704.9	5
32 C.F.R. App. L	30
41 C.F.R. § 60-40	30
41 C.F.R. § 60-40.2(a)	31
Pub. L. No. 92-261, 86 Stat. 103	36
Pub. L. No. 93-502, 88 Stat. 1561	7,19 22,24

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Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 88th Cong., 1st Sess. (1964)	7,16,50
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	Page
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S. Rep. No. 813, 89th Cong., 1st Sess. (1965)	*passim*
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H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. (1972)	19
104 Cong. Rec. 6550 (1958)	49
110 Cong. Rec. 1776 (1964)	17
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	Page
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Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act*, 76 Colum. L. Rev. 1029 (1976)	48
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Telling Tales—How Law Is Being Used To Pry Business Secrets From Uncle Sam's Files, Wall Street Journal, May 9, 1977	9

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the country. With a membership in excess of 69,000 enterprises, including more than 3,700 state and local chambers of commerce and trade associations, the Chamber represents businessmen and women in a broad spectrum of matters of critical importance to the business community.

The instant case is of vital concern to the large number of Chamber members who have submitted—and continue to submit—to federal agencies confidential business information which may be subject to disclosure under the Freedom of Information Act. At stake in this case is the ability of American business to protect trade secrets and business data tendered in confidence to government entities from misuse by foreign and domestic competitors.

The Chamber and its members also are concerned that a judicial determination which impairs the ability of the owners of business secrets to assert affirmatively and vigorously their proprietary interests ultimately will result in a reluctance on the part of business to cooperate voluntarily with government agencies in the collection of data necessary to the performance of their statutory missions.

SUMMARY OF THE ARGUMENT

The Freedom of Information Act* increasingly is being used by competitors to discover the extensive files of business secrets maintained by federal agencies.

FOIA Exemption 4 is an integral part of the vast historical system of federal and state law which protects trade secrets and confidential business information from competitive misuse. The exemption was intended to assure the confidentiality of business secrets which customarily are maintained in confidence by the owner. This protective policy is rooted in the belief that protection of proprietary business secrets fosters invention, industrial efficiency and fair commercial dealing.

The ruling of the Third Circuit in the instant case eviscerates this protection. By limiting a judicial action to prevent disclosure of business secrets to review of the agency record, denying the submitter a de novo determination whether his business records are within Exemption 4, and allowing the agency the discretionary authority to disclose information even though it is found to be within Exemption 4, the Third Circuit's holding makes the exemption meaningless.

A de novo judicial determination as to whether business information is within Exemption 4 is an essential part of the FOIA scheme. Congress provided de novo review of the propriety of agency FOIA decisions to prevent court decisions from becoming "meaningless judicial sanctioning of agency discretion." This rationale is equally applicable to actions to compel disclosure of records as well as actions to enjoin disclosure. Restrictions on the time allowed for action, imposed by the FOIA itself, render the agencies inherently incapable of providing adequate factfinding procedures for deciding whether business secrets should be disclosed. Under these circumstances, where the impairment or destruction of valuable

* 5 U.S.C. § 552 (1976) (hereinafter cited as "FOIA" or the "Act"). Unless otherwise indicated, all U.S. Code citations are to the 1976 edition.

private interests is at stake, the Administrative Procedure Act requires that *de novo* judicial review be provided.

Business secrets which admittedly are within Exemption 4 may not be disclosed at the discretion of agency officials. In enacting Exemption 4, Congress determined as a matter of policy that the need for confidentiality of business information outweighed the general public interest in disclosure. Exemption 4 therefore forecloses agency discretion to disclose exempt business secrets. To grant agency FOIA officials the discretion to release business secrets which admittedly are exempt from disclosure is to nullify this policy and render the exemption nugatory.

Exemption 4 itself embodies a deliberate congressional balancing of the public interests in disclosure and in confidentiality of private business information, and accordingly there is no place for further interest balancing by agency officials once records are found to be exempt. The public policy which protects business secrets would be eroded if interest balancing were permitted on a case-by-case basis. Congress enacted the FOIA precisely to do away with vague phrases such as "the public interest" as a test for confidentiality, and manifestly did not intend to resurrect this unworkable standard as a basis for agencies to circumvent Exemption 4 at their whim.

Agency officials also are prohibited from disclosing business secrets provided to government agencies under the Trade Secrets Act, 18 U.S.C. § 1905. Section 1905 is a statute within Exemption 3 of the FOIA, since it leaves agencies with no discretion to withhold business secrets and establishes particular criteria and types of materials to be withheld. Agency regulations, such as those issued under the housekeeping statute, 5 U.S.C. § 301, may not authorize disclosure of business secrets admittedly within § 1905. The legislative history of the housekeeping statute explicitly declares that it was not intended to affect the confidential status of information protected by 18 U.S.C. § 1905.

ARGUMENT

I.

THE COLLECTION AND DISCLOSURE OF BUSINESS SECRETS BY FEDERAL AGENCIES: AN OVERVIEW

A. Confidential Business Information Submitted to Federal Agencies

Federal agencies collect extensive amounts of private business information in the course of performing an array of statutory functions. Portions of these records describe trade secrets, technical know-how, financial data, and other commercial information of enormous competitive value.[1] Because of its commercial value and the resources invested in its acquisition, this information is customarily maintained in strict confidence by the owner.

The variety of business secrets in the Government's files is impressive. The records may take the form of an application for a license to sell a drug,[2] data submitted in connection with a

[1] It has been estimated that one billion dollars of the United States 1975 balance of payments reflected licensing of trade secrets and know-how. *See* J. O'Reilly, Federal Information Disclosure, ch. 14, p. 14-20 n.42 (1977), *citing* R. Milgrim, address to Illinois Institute of Continuing Legal Education, Oct. 29, 1976.

[2] To obtain approval of an application for a new drug, for example, the Food and Drug Administration requires the submission of extensive information describing testing techniques, safety and effectiveness test results, as well as the drug's composition and method of manufacture. *See* 21 U.S.C. § 355 (b)(1)-(4) (1970). An application may consume several volumes of data. *See Business Record Exemption of the Freedom of Information Act: Hearings Before the House Subcomm. of the Comm. on Government Operations,* 95th Cong., 1st Sess. 88 (1977) (statement of FDA Commissioner Kennedy) (hereinafter cited as *"1977 House FOIA Hearings"*).

registration statement,[3] financial report,[4] government contract proposal,[5] data concerning telecommunication production,[6] report concerning manufacture of chemical substances,[7] test

[3] Information submitted to the Securities and Exchange Commission in connection with the registration of securities may contain sensitive commercial and financial information including sales figures, "mark-up," cost of goods sold, product inventories and profit margins. *See* American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236 (D.C. Cir. 1937); 15 U.S.C. §§ 78l, 78m, 78x; 17 C.F.R. § 200.80(b)(4) (1977).

[4] Line-of-business reports submitted to the Federal Trade Commission may refer to such diverse matters as sales and profit figures, market share data, advertising plans and geophysical data. *See* 15 U.S.C. §§ 45, 46 and 49; FTC v. Texaco, Inc., 517 F.2d 137, 150-151 (D.C. Cir. 1975).

[5] Federal agencies receive an extensive array of technical, financial and other commercial information in the course of their procurement activities. Detailed technical and financial disclosures are contained in contract proposals. *See, e.g.,* Armed Services Procurement Regulation (ASPR) 3-507.1, 32 C.F.R. § 3-507.1 (1976). *See also* USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976) (slip op.). Additional technical and financial data are submitted during contract performance in engineering changes, test reports, audit reports, equal employment opportunity reports, payroll records and a host of other submissions. *See, e.g.,* 32 C.F.R. § 7-602.23 (payroll records), 7-103.18 (EEOC reports), 7-103.29 (environmental data), 7-104.15 (Government may inspect all books), 18-704.9 (Government right to investigate labor disputes) (1976).

[6] The Federal Communications Commission, in connection with its responsibility for licensing and programming, obtains data from radio and television networks regarding acquisition, ownership, production, distribution, sale and licensing of programs. *See* FCC v. Schreiber, 329 F.2d 517 (9th Cir. 1964), *mod'fd and remanded,* 381 U.S. 279 (1965).

[7] The Environmental Protection Agency receives information concerning inventories, product formulas, testing techniques and results and manufacturing processes for chemical substances and pesticides. *See* 42 Fed. Reg. 64,572-96 (Dec. 23, 1977) (toxic substances inventory reporting requirements); 15 U.S.C. § 2605, 2608; 7 U.S.C. § 136a (c)(2) and 40 C.F.R. § 162.1 (1977) (pesticide registration data requirements).

report on nuclear equipment,[8] investigatory report,[9] inspection report,[10,11] and a study of oil or gas reserves,[12] among many others.

Testifying in support of an exemption for private business information during the congressional hearings on the FOIA bill, a Justice Department representative stated:

> Much of this information is volunteered by employers, merchants, manufacturers, carriers, exporters, and other businessmen and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public and the agencies. Perhaps the greater part of such information is exacted, by statute, in the course of necessary regulatory or other governmental functions. [13]

[8] The Nuclear Regulatory Commission obtains proprietary information pertaining to the design, development and testing of equipment for nuclear power production. *See, e.g.,* 10 C.F.R. §§ 40.62-40.63, 50.34, 50.70, 70.22, 70.55-70.57 (1977).

[9] For example, the Tariff Commission, pursuant to its powers to investigate unfair competitive practices in the import trade, and to provide guidance for establishment of tariffs, obtains extensive data pertaining to the costs of production of domestic and foreign products. *See* 19 U.S.C. §§ 1330-1341 (1970 & Supp. V 1975).

[10] The Consumer Product Safety Commission requires the submission of inspection reports which may disclose sales volume as well as formulas, processes and designs employed for the manufacture of products. *See* 15 U.S.C. § 2076, 16 C.F.R. § 1115.7 (1977).

[11] The Occupational Safety and Health Administration maintains inspection case files which may contain employee identification data, as well as blueprints, drawings, designs, chemical formulas, specifications, and manufacturing processes. *See* 29 U.S.C. § 657(a) (1970), 29 C.F.R. § 1903 (1977).

[12] The Federal Power Commission obtains statistics regarding natural gas and oil well reserves. *See* Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976).

The concern over governmental disclosure of these extensive files of private business records has prompted considerable comment and investigation.[14]

B. Use of the FOIA to Discover Competitors' Secrets

The wealth of valuable business secrets in the files of government agencies and the greatly liberalized disclosure policies brought about by the 1974 Amendment of the FOIA[15] have facilitated the increasingly widespread and disturbing use of the FOIA as a vehicle for industrial espionage.[16] This problem was discussed in detail in recent FOIA oversight hearings.[17]

[13] *Freedom of Information: Hearings on S. 1666 and S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 88th Cong., 1st Sess. 199 (1964) (hereinafter cited as "*1964 Senate FOIA Hearings*").

[14] *See* Brief *Amicus Curiae* of the Chamber of Commerce in Support of Petition for a Writ of Certiorari at 5, n.7; *FOIA Hearings, infra* note 17, *supra* note 3.

[15] Act of November 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561. *See* discussion at pp. 19-24 *infra.*

[16] Because of their great commercial value, trade secrets and confidential commercial information historically have been the subject of misappropriation by competitors. *See, e.g.,* Telex Corp. v. IBM, 367 F. Supp. 258 (N.D Okla. 1973), *rev'd, in part,* 510 F.2d 894 (10th Cir. 1975). There, the dispute over the theft of proprietary information such as marketing analyses, financial forecasts, product costs, plans for new products, and technical details for certain computer equipment, led to the entry of judgments totaling $18.5 million. 510 F.2d at 933. *See generally* R. Milgrim, Trade Secrets (1977).

[17] *See 1977 House FOIA Hearings* at 14, 69-71, 77, 104-05, 116; *Freedom of Information Act: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee,* 95th Cong., 1st Sess. 4, 425-27 (hereinafter "*1977 Senate FOIA Hearings*").

The Commissioner of the Food and Drug Administration described the problem at his agency:

> The records we maintain are often laden with trade secrets or confidential commercial information and, as the recipient of enormous numbers of FOIA requests — we expect some 25,000 this year — we are called upon daily to make disclosure decisions that involve potentially valuable business information. [18]

Approximately 86 percent of the FOIA requests received by the FDA come from industry and private attorneys. The agency suggested that the large bulk of these requests were associated with "industrial espionage in which many commercial firms engage."[19]

> Indeed, it is difficult to avoid the conclusion that FOI is substantially being used as a means of corporate intelligence gathering. This certainly is not what the FOI Act was designed to achieve.[20]

A recent FDA sponsored study concluded that disclosure to competitors of registration data submitted by firms to obtain

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[18] *1977 House FOIA Hearings* at 68.

[19] *See* 42 Fed. Reg. 3094 (1977). The FDA experience prompted one commentator's observation that "freedom of information may be less a vehicle for informing the public than a vast fishing expedition for private industry." Arnold, *Who's Going Fishing in Government Files?*, 6 Juris Doctor 17, 22 (April 1976).

About 40 percent of the FOIA requests to the FDA come from "FOI service companies" which place and monitor FOIA requests on behalf of corporate clients. The Director of the FDA's public records and documentation center stated that "we get a lot of requests from companies who are trying to get valuable commercial information about their competition. . . ." *Id.*

[20] *1977 Senate FOIA Hearings, supra* note 17, at 4 (statement of Sherwin Gardner).

approval of new drug applications would deter innovation and investment in research and development.[21]

Use of the FOIA to obtain a competitor's proprietary manufacturing processes,[22] product designs,[23] and technical and financial data submitted in successful government contract proposals [24] has been reported, and numerous other incidents

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[21] *Study to Assess Impact of Releasing Safety and Effectiveness Data on the Pharmaceutical Industry's Incentives to Invest in and Conduct Research and Development Programs,* U.S. Dep't of Commerce National Technical Information Service PB-275 856 at vi, 86-88 (prepared by Placon, Inc., Vienna, Va. 1978).

[22] Dow Chemical Company complained of an incident which occurred during negotiations with a foreign firm for sale of Dow technology regarding a proprietary process for producing a commercial product. While the negotiations were in progress, Dow was required to submit information about the process to a federal agency. Unknown to Dow, the foreign firm obtained copies of the information submitted to the agency by Dow and other U.S. producers under the FOIA. The foreign firm subsequently renounced interest in the purchase of Dow's technology. *See 1977 House FOIA Hearings, supra* note 3, at 283.

[23] The Air Cruisers Company received approval of a new and commercially valuable large life raft design based on data submitted to the FAA. Air Cruisers' competitor obtained the life raft design from the FAA through a Freedom of Information Act request. The information enabled the competitor to design its own large life raft and win an important European contract that it was competing for against Air Cruisers. *See Telling Tales - How Law Is Being Used To Pry Business Secrets From Uncle Sam's Files,* Wall Street Journal, May 9, 1977, *reprinted in 1977 Senate FOIA Hearings, supra* note 17, at 425-27.

[24] In Honeywell Information Systems v. NASA, C.A. No. 76-353 (D.D.C. July 28, 1976), *appeal dismissed,* No. 76-1977 (D.C. Cir. May 6, 1977), Honeywell's competitors in the computer industry, Burroughs Corporation, Univac Corporation and Control Data Corporation, sought information from Honeywell's successful government contract proposal for computer services and equipment which disclosed its pricing and discount policies, cost and profit margin, and innovative technical methodologies for computer software. Slip op. at 3.

(Footnote continued)

involving use of the FOIA to discover competitors' business secrets also have been noted.[25] As one court observed, "the problems posed by companies using the Freedom of Information Act to conduct 'industrial espionage' remain troublesome."[26]

C. The Business Secrets Exemption

1. *General Protection of Business Secrets*

Trade secrets and confidential business information traditionally have been protected against competitive misuse under both federal and state law. This protective policy stems from the belief that in a free enterprise economic system protection of proprietary business secrets promotes innovation, invention and industrial efficiency, as well as honest dealing and fair commercial practices.[27] Exemption 4 of the FOIA is an

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(Footnote continued)

Competitors' use of the FOIA to obtain similar computer system technical and financial data from contract proposals was at issue in Burroughs Corp. v. Schlesinger, 403 F. Supp. 633 (E.D. Va. 1975) (attempt by Sperry Rand-Univac to obtain Burrough's data); Leeds & Northrup Co. v. ERDA, CA. No. 77-1047 (D.D.C., filed June 16, 1977) (attempt by Honeywell to obtain Leeds & Northrup's data) (dismissed upon stipulation not to disclose disputed records, July 11, 1977).

See also USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976) (preliminary injunction) (attempt by competitor to obtain contract proposal disclosing innovative design data); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976) (request for data from plaintiff's purchase orders disclosing pricing and negotiation policies for nuclear power propulsion systems).

[25] *See 1977 House FOIA Hearings, supra* note 3, at 14, 69-71, 77, 104-05, 116. *See generally* Brief *Amicus Curiae* of the Chamber of Commerce, *supra* note 14, at 5, n.7.

[26] Honeywell Information Systems, Inc. v. NASA, *supra* note 24, slip op. at 8, n.8. *See also The Freedom of Information Act—A Tool of Industry?,* Sacramento Bee, January 1, 1978, A-3.

[27] *See generally* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), discussed *infra.*

integral aspect of the overall state-federal policy of protection for business secrets which has been woven into our legal system.

Confidential business information historically has received protection under the law of trade secrets (discussed at length by this Court in *Kewanee Oil Company v. Bicron Corp.*)[28] and the law of unfair competition.[29] In holding that the trade secret laws complement rather than conflict with the federal patent system, the Court observed that the purpose of the legal protections for trade secrets, as well as patents, is to encourage invention, promote the subsidization of research and development, and increase economic efficiency:[30]

> [K]eeping [customer lists or advertising campaigns] secret encourages businesses to initiate new and individualized plans of operation, and constructive competition results. This in turn leads to a greater variety of business methods than would otherwise be the case if privately developed marketing and other data were passed illicitly among firms involved in the same enterprise.[31]

Trade secret protection was found to have a "decidedly beneficial effect on society:"

> Trade secret law will encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered . . .

and the public obtains the benefits of the invention.[32] Without this protection "organized scientific and technological research

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[28] 416 U.S. 470 (1974).

[29] *See generally* Int'l News Service v. Associated Press, 248 U.S. 215 (1918); R. Callman, Law of Unfair Competition, Trademarks and Monopolies, ch. 14, 15 (3d Ed. 1968).

[30] 416 U.S. at 482-84.

[31] *Id.* at 483.

[32] *Id.* at 485. *See also* F.M. Scherer, The Economic Effects of Compulsory Patent Licensing 14 (1977).

could become fragmented, and society, as a whole, would suffer."[33]

Trade secret laws not only promote research and innovation, but also prevent the corruption of honest business methods and fair competitive dealing, and "the inevitable cost to the basic decency of society when one firm steals from another."[34] To condone industrial espionage threatens "a most fundamental human right, that of privacy. . . ." [35]

The law of unfair competition similarly forbids the unlawful exploitation of a competitor's efforts, investment and skills. In *Int'l News Service v. Associated Press,* the Court disapproved a competitor's attempt to take information "that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money," and appropriate and sell it as its own, endeavoring "to reap where it has not sown."[36]

Federal laws and regulations also are replete with protections for business secrets. In government contracting, extensive business data are submitted to federal agencies. The contractor's interest in protecting its technical data has been set forth by the Commission on Government Procurement:

> Commercial organizations have an economic interest in technical data (particularly data disclosing details of design or manufacture) which they have developed at their own expense. Such data is closely guarded because its disclosure to competitors could jeopardize the competitive advantage gained through developing the data. As long as the data is not availble to others, an originating contractor may be the sole source or, at least, competitively advantaged, in providing the product or service to which the data is related.

[33] 416 U.S. at 486.
[34] *Id.* at 487.
[35] *Id.*
[36] 248 U.S. 215, 239 (1918). *See also* Callman, *supra* note 29.

> The willingness of many prospective contractors and suppliers to accept Government contracts is dependent on the willingness of the Government to protect information resulting from private development. [37]

To protect such data, procurement agencies have adopted regulations respecting the contractors' rights in data.[38] Without protection for contractors' business secrets, the public contracting system, dependent upon full competition to secure for the public the best goods at the lowest prices, could suffer a serious loss of interested competitors.[39]

Numerous federal statutes provide for the confidentiality of specific types of business secrets. The Food, Drug and Cosmetic Act prohibits FDA disclosure of "any information acquired under [the agency's] authority concerning any method or process which as a trade secret is entitled to protection." 21 U.S.C. § 331(j) (1970). The EPA is prohibited from disclosing trade secrets and confidential business information under § 307(a) of the Clean Air Act of 1971, 42 U.S.C. § 1857h-5(a)(1) (Supp. V 1975), § 14 of the Toxic Substances Control Act, 15 U.S.C. § 2613, § 10 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136h. The FTC has the authority "to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers," § 6(f) of the Federal

[37] Report of the Commission on Government Procurement, Volume 4, Part I—Patents, Technical Data, and Copyrights, 127 (1972).
[38] *See e.g.,* NASA Procurement Regulation 9.203-1, 41 C.F.R. § 18-9.203-1 (1977); Armed Services Procurement Regulation 9-203(b), 32 C.F.R. § 9-203(b) (1976); Energy Research and Development Administration Procurement Regulation 9-9.202-3, 41 C.F.R. § 9-9.202-3 (1977); Department of Transportation Procurement Regulation 12-9.6302, 41 C.F.R. §12-9.6302 (1977).
[39] *See* Fisher v. Renegotiation Board, 355 F. Supp. 1171, 1175 (D.D.C. 1973); USS-OCF-W&M v. Eckerd, *supra* note 24, slip op. at 5.

Trade Commission Act, 15 U.S.C. § 46(f). The Patent Office is required to maintain applications for patents in confidence, 35 U.S.C. § 122, (1970). Many other examples may be cited [40] including the Trade Secrets Act, 18 U.S.C. § 1905, discussed *infra,* which makes unlawful the disclosure of certain business information by agency officials.[41]

Failure to maintain strong protections for business secrets submitted to the government in the face of the FOIA will result in reluctance by industry to continue voluntarily to submit information to government agencies, and to commit resources to certain areas of research and development. Reluctance to cooperate with agencies already has been reported,[42] and government officials predict that inadequate protection under FOIA Exemption 4 will further restrict the flow of information to the government.[43] Industry's unwillingness to invest in

[40] *See e.g.,* 7 U.S.C. §§ 12, 472, 507, 608d, 955, 2105(i); 13 U.S.C. § 214; 15 U.S.C. §§ 176a, 2055(a)(2); 21 U.S.C. § 346a(f) (1970); 29 U.S.C. § 664 (1970); 42 U.S.C. §§ 2000e(8)(e), 2181e (1970); 42 U.S.C. § 242m(d) (Supp. V 1975); Internal Revenue Code § 6103(a), and § 7213(a)(1)-(3).

[41] *See* pp. 46-50 *infra.*

[42] Former SEC Commissioner Manuel Cohen stated, "Companies are becoming increasingly shy about sharing information with government because they fear it will no longer be protected." Arnold, *supra* note 19, at 18. *See also 1977 Senate FOIA Hearings, supra* note 17, at 44, 314.

[43] The Justice Department has stated that the failure to provide adequate and certain protection for business information probably would have a "definite restraining effect" on the flow of information, and that "substantial detriment to the effective performance of some governmental functions can be anticipated." *1977 House FOIA Hearings, supra* note 3, at 231-32.

The Deputy General Counsel of the Federal Trade Commission commented:

> One consequence of making information public is that it is harder to get it. That is another factor we have to take into account. We have a much bigger backlog of litigation and resistance to our inquiries now than used to be the

(Footnote continued)

innovative research and development, whose results may be disclosed to competitors under the FOIA, has been documented in a recent agency report.[44]

To conclude, "A national policy exists which protects confidential business information."[45] This policy, deeply rooted in the federal and state legal systems, forms the backdrop for the interpretation and understanding of FOIA Exemption 4.

2. *Legislative Purpose of Exemption 4*

Exemption 4 was created to "assure the confidentiality" of business information which "would not customarily be made public by the person from whom it was obtained by the government."[46] The Senate Judiciary Committee explained:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.[47]

(Footnote continued)

> case. It is precisely because of the possibility that the Commission will make the information public.
>
> There is a case in point. In 1950, we did a survey of the thousand largest companies just to get information about their sales broken down by census product categories. Everyone complied; there wasn't any fuss or any litigation. The individual company data was not made public until 1972.

We are currently conducting a successor survey. It is being fought tooth and nail by a significant number of the companies including the biggest company in the country.

1977 Senate FOIA Hearings at 24 (statement of Gerald P. Norton); *see also* pp. 8, 13.

[44] *See* FDA report, *supra* note 21.

[45] USS-OCF-W&M v. Eckerd, *supra* note 24, slip op. at 5.

[46] H. R. Rep. No. 1467, 89th Cong., 2d Sess. 10 (1966), 1966 U.S. Code Cong. & Ad. News 2418, 2427.

[47] S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

Examples of information within the exemption include business sales statistics, inventories, customer lists, and manufacturing processes.[48]

The case for a business secrets exemption was advocated by numerous agencies.[49] The principal concern was for an assurance that business secrets which traditionally had been sheltered against release to competitors would continue to receive confidential treatment under the new freedom of information law.[50] For example, a Treasury Department official stated:

> We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.[51]

A Justice Department official echoed the view that protection of business secrets was necessary in order to preserve the Nation's commercial and economic system:

> A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. . . . [T]he greater part of such information is exacted, by statute, in the course of necessary regulatory or other governmental functions.
>
> Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information

[48] H.R. Rep. No. 1497, *supra* note 46.

[49] *See 1964 Senate FOIA Hearings, supra* note 13, at 244-45 (AEC comments), 250-51 (USDA comments); 254, 257-58 (Commerce Dept. comments); 268-71 (Treasury Dept. comments).

[50] *Id.* at 244-45, 250-51, 254, 257-58, 268-71.

[51] *Id.* at 174.

> should be afforded appropriate protection, at least from competitors.[52]

The exemption was supported by representatives of industry[53] and members of Congress, because of the potential for competitive misuse of business secrets[54] and because disclosure could "seriously jeopardize" sources of information relied on by federal agencies.[55] When, during hearings on an FOIA bill, the question was raised whether detailed "financial, economic and technical" information required by an agency under a loan program could be disclosed to the borrower's competitors, a member of the Subcommittee stated:

> There is a specific exemption in here to cover that point, and I do not think anybody has any intention that this material be made public. [56]

The legislative history of Exemption 4 demonstrates a strong congressional desire to "avert the danger that valuable business information would be made public by agencies which had obtained it pursuant to statute or regulation."[57] Although

[52] *Id.* at 199.

[53] *See, e.g., id.* at 89-90 (testimony of National Association of Broadcasters on consequences of disclosure of business information filed with the Federal Communications Commission).

[54] *Id.* at 102 (information filed in Small Business Administration loan application would reveal financial condition to competitors). *See* National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765, 768 (D.C. Cir. 1974).

[55] 110 Cong Rec. 1776 (1964) (sources of information relied upon by the Bureau of Labor Statistics would be "seriously jeopardized" unless the information collected by the Bureau was exempt from disclosure). *See* National Parks, *supra* note 54, at 767 ("Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.").

[56] *Hearings on S. 1160 before the Subcom. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary,* 89th Cong., 1st Sess. 342 (1965).

[57] National Parks, *supra* note 54, at 768.

the FOIA primarily was intended to provide a right to disclosure of government records, Congress intended Exemption 4 to protect an *equally important* right to privacy. The Senate Judiciary Committee declared:

> At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to information in government files. . . .[58]

Exemption 4 must be viewed as an integral part of the comprehensive legal environment which protects business secrets against misappropriation by competitors. Perceived in this light, it seems clear that the purpose of this exemption was to ensure the continuation of the traditional precepts of protection for business secrets which existed at the time the FOIA was enacted. Exemption 4 was to maintain the status quo: Business information which industry had customarily held in confidence would continue to be protected from disclosure by Exemption 4.

D. The Reverse FOIA Problem

The FOIA is a disclosure statute.[59] The problem which Congress remedied by enactment of the FOIA was the improper withholding of information by agencies,[60] and accordingly the Act provides explicit mechanisms for a private person to obtain documents held by an agency.[61]

The legislative history of the FOIA is virtually devoid of any reference to disputed incidents of agency disclosure of private business information arising prior to the law's enactment. Since withholding, rather than disclosure, was seen to be the problem in 1966, the statute is consumed, from a *procedural*

[58] S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

[59] *See generally* EPA v. Mink, 410 U.S. 73, 79 (1973); Dept. of Air Force v. Rose, 425 U.S. 352, 360-361 (1976).

[60] *Id.*

[61] *See* 5 U.S.C. § 552(a)(1)-(6).

vantage, with devices to ensure access to records. While the Act and its history demonstrate obvious strong concern for protecting certain substantive privacy rights,[62] no actual problems in this regard had previously arisen and consequently no express procedural rights for submitters of information were included in the Act. And indeed, for several years following the enactment of the FOIA, no cases challenging agency disclosure of private business records are reported. This changed drastically with the enactment of the FOIA amendments in 1974.[63]

In response to "years of foot-dragging by the federal bureaucracy"[64] and the widespread reluctance of agencies to "honor the public's right to know,"[65] Congress amended the FOIA in 1974 to facilitate "freer and more expeditious public access to government information."[66] The amendments promoted agency disclosure in several respects. Principally, they required that agency determinations whether to disclose requested records be made within ten days after receipt of the request;[67] they provided sanctions against agency employees for arbitrary withholding of records;[68] they allowed assessment of attorney's fees and litigation costs against the United States if the complainant substantially prevailed;[69] and they provided that noncompliance with a court order by agency employees may be punished with a contempt citation.[70]

[62] *See* Part I(C) *supra.*

[63] Act of November 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561.

[64] Administration of the Freedom of Information Act, 21st Report by the Committee on Government Operations, H.R. Rep. No. 92-1419, 92nd Cong., 2nd Sess. 8 (1972).

[65] *Id.*

[66] S. Rep. No. 93-854, 93rd Cong., 2nd Sess. 1 (1974).

[67] *See* 5 U.S.C. § 552(a)(6)(A)(i). Appeals from adverse determinations are required to be determined by the agency within twenty days. 5 U.S.C. § 552(a)(6)(A)(ii).

[68] 5 U.S.C. § 552(a)(4)(F).

[69] 5 U.S.C. §552(a)(4)(E).

[70] 5 U.S.C. § 552(a)(4)(G).

Although the 1974 amendments achieved the intended goal of facilitating public access to agency files, they also had the unfortunate and unintended effect of promoting the flow of business secrets from these files into the hands of competitors. There are several reasons why this occurred.

First, the amendments finally reversed the bureaucratic impulse to shield, rather than reveal, information. Before the amendments, an agency typically might withhold 90 percent of its files and disclose 10 percent. After the amendments, these figures were reversed.[71] Many of these files include private business records.

Second, the amendments made it much more difficult for agencies to cull out information of commercial importance to the submitter. By limiting the agencies to ten working days within which to find, review and determine the exempt status of records, the amendments precluded careful analysis of the competitive consequences of disclosure of business information. The SEC, for example, announced that even though there may be a valid basis for objection to disclosure on the grounds of business secrecy, the stringent time limitations of the Act prevent the Commission from refusing to disclose records on this basis.[72] The agencies themselves do not possess enough

[71] *See e.g.*, testimony of Stuart Pape, Office of General Counsel, FDA, *1977 House Foia Hearings* at 74; *See also id.* at 9, 12, 32, 84, 98.

[72] SEC Release No. 33-5571, 40 Fed. Reg. 8797, 8799 (March 3, 1975):

> The Commission regrets that in many cases the Commission will disclose records although persons who cooperated in its investigation would have reasonable grounds to object, either because of personal privacy or business secrecy considerations. But the stringent time requirements under the Freedom of Information Act, as amended, as well as the heavy financial and manpower burden that the Commission would be obliged to sustain if it were to attempt to examine each individual record for these purposes, would generally prevent the Commission from refusing to make disclosure on these bases.

information and expertise to appreciate the competitive value of certain business records, and the Act does not afford them the time to obtain such information from the submitter.[73] Given their shortage of time and lack of knowledge, and the ever-present threat of employee sanctions and assessment of attorney's fees for improper withholding, it is not difficult to perceive why disclosure of business records has been the path of least resistance from the agencies' point of view.[74]

Third, the sheer numbers of FOIA requests increased markedly as a result of the enactment of the 1974 amendments.[75] Most of the present use of the FOIA is by corporations,

[73] On the issue of whether the disclosure of business records would cause competitive harm to the submitter, the EPA, for example, has stated that "the Agency seldom has much information with which to make this judgment." *1977 House FOIA Hearings, supra* note 3, at 5. The EPA has recognized, however, that where it does not have enough information on the issue of business secrecy, and cannot obtain the information and evaluate the issues within ten days, it must, when a reasonable claim of confidentiality is made by the submitter, deny the request and attempt to obtain the information it needs for its determination. *Id.* at 4-5. Even when it does obtain information from a submitter asserting reasons for confidentiality, the EPA admits that "without specialized knowledge of the business or the particular industry" the Agency finds it difficult to evaluate whether disclosure would result in competitive harm to the submitter. *Id.*

[74] This subject is discussed in more detail in Part II(B) *infra.*

[75] Several agencies reported greatly increased numbers of requests after the enactment of the amendments. For example, the FBI received 447 FOIA requests in 1974; the number increased to 13,875 in 1975 and approximately 17,000 in 1977. During the same period of FBI's cost of implementing the statute rose from $160,000 to $9.1 million. The Department of Justice handled 100 FOIA appeals the year preceding the 1974 amendments, and 1,276 the following year. *See* Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 612, 617 (D.C. Cir. 1976); *The Freedom of Information Act— A Tool of Industry?*, Sacramento Bee, Jan. 1, 1978, at A-3. The EPA reported receiving only one FOIA request in the first six months of its existence (to July 1971), Joint Committee Print, House Com-

(Footnote continued)

private attorneys, and FOIA service firms, and a substantial portion of these requests are directed at private business records.[76]

Fourth, shortly before the enactment of the amendments the D.C. Circuit issued an extensive analysis of the scope of Exemption 4 in *National Parks and Conservation Assn. v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). Prior to this case, decisions involving Exemption 4 generally had been guided by the relevant language in the Senate and House Reports, providing that information should be considered exempt if it is the type which would customarily not be released to the public by the person from whom it was obtained. *See, e.g., Grumman Aircraft Eng. Corp. v. Renegotiation Board,* 425 F.2d 578 (D.C. Cir. 1970). In *National Parks,* however, the court adopted a new test for the exemption, which required the proponent of the exemption to show that disclosure of the disputed records would be likely to cause substantial harm to the competitive position of the submitter. 498 F.2d at 770. The difficulty presented by this test, requiring a finding that release of records would in fact be "likely" to actually cause the submitter "substantial" competitive harm, had the effect of severely narrowing the protection afforded by the exemption and con-

(Footnote continued)
mittee on Government Operations and Senate Judiciary Committee: Freedom of Information Act and Amendments of 1974 (P.L. 93-502), 94th Cong., 1st Sess. 105 (1975). In calendar year 1976, the EPA received 4,113 FOIA requests, of which 96 percent were granted, *1977 House FOIA Hearings, supra* note 3, at 9.

For further examples from other agencies, *see generally* and *compare* H. Relyea, Library of Congress Congressional Research Service, the Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1975 No. 76-166G (1976), with the same report for the year 1976: No. 77-228G (1977).

[76] *See 1977 House FOIA Hearings, supra* note 3, at 69; *see also id.* at 8, 23, 77. *See generally* note 17, *supra* and accompanying text.

sequently enlarged the flow of business records from agency files.[77]

As a result of these factors, agency disclosure of private business records has become a frequent occurrence. Companies who had previously submitted such information have learned that the FOIA does not require that notice be provided prior to disclosure of their records, and in many instances, the agencies have not provided prior notice.[78] Even where notice has been

[77] The inability of the Government to adequately protect confidential business information under the National Parks test, *even when the Government agrees the data should not be disclosed,* is illustrated by Military Audit Project v. Kettles, C.A. No. 75-666 (D.D.C., May 17, 1976) (granting summary judgment in favor of FOIA requester). The court reluctantly found the Government had not met its burden of proof that disclosure of a government contractor's profits, labor costs and production cost trends would be "likely" to cause the contractor "substantial" competitive harm, slip op. at 7-10, but noted:

> The government's failure of proof has caused this Court some consternation. Common sense leads this Court to hesitate in ordering disclosure since the very nature of the data contained in the documents raises the possibility of harm to Lockheed's competitive position.

Id. at 10. *See also 1977 House FOIA Hearings, supra* note 3, at 5 (describing the EPA's difficulty in applying the "substantial competitive harm" test for Exemption 4). The National Parks test has been adopted, usually without analysis, by most agencies and courts. *See generally* O'Reilly, *supra* note 21 ch. 14.08, p. 14-29.

The Chamber of Commerce believes that the National Parks test of "substantial competitive harm" for Exemption 4 is erroneous and has severely limited the effectiveness of the exemption in achieving the protection for business secrets that Congress intended. The test has been criticized by the business community. *See 1977 House FOIA Hearings, supra* note 3, at 113-19, 157-58, 160, 166-68. The Court should be aware of the pitfall of unintended approval of this contested standard by incidental citation.

[78] *See 1977 House FOIA Hearings, supra* note 3, at 2, 69-70, 100, 127, 164. The FDA not only fails but *refuses* to give notice in many cases, for its own administrative convenience. *Id.* at 69. *See* Pharmaceutical Mfr's Assn. v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976).

given, the short FOIA time restrictions have precluded the submitter from effectively presenting his case.[79] The FOIA does not provide a submitter the right to appeal an adverse agency decision to disclose his records; the statutory time restrictions actually prevent the agencies from delaying disclosure pending an administrative appeal.[80]

As a consequence of the marked increase in agency decisions to disclose confidential business information and the lack of an effective administrative remedy for the submitter, a proliferation of reverse FOIA actions struck the courts beginning in 1974.[81]

E. The Reverse FOIA Cases

Six Courts of Appeals have issued decisions in reverse FOIA cases.[82] Jurisdiction has uniformly been found under 28

[79] *See* discussion at pp. 28-32, *infra.*

[80] In the instant case the Agency denied Chrysler's request for confidentiality and noted:

> The decision may be appealed to the Office of Federal Contract Compliance. . . . However, due to the time constraints imposed by the recent amendments to the Act (Public Law 93-502), we cannot wait for the results of such an appeal. Accordingly, the subject documents . . . will be released five working days after your receipt of this letter.

565 F.2d 1172, 1179 (3rd Cir. 1977).

[81] *See* Brief *Amicus Curiae* of the Chamber of Commerce in Support of the Petition for a Writ of Certiorari at 3, n. 5.

[82] *District of Columbia Circuit;* Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975); *see also* Planning Research Corp. v. FTC, 555 F.2d 970 (D.C. Cir. 1977; Sears, Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir. 1977), *cert. denied,* 46 U.S.L.W. 3215 (1977); Sears, Roebuck & Co. v. GSA, 509 F.2d. 527 (D.C. Cir. 1974).

Third Circuit: Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3rd Cir. 1977).

Fourth Circuit: Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied, sub nom.* Brown v. Westinghouse Elec. Corp., 431 U.S. 924 (1977).

(Footnote continued)

U.S.C. § 1331.[83] The issues dividing the courts concern the right to a de novo hearing on the question of exemption; the discretion of agency officials to disclose business secrets admittedly within Exemption 4; and the employment of 18 U.S.C. § 1905 as a prohibition of agency disclosure of business secrets.

Charles River Park "A", Inc. v. HUD,[84] supplied the first thorough circuit court analysis of the reverse FOIA suit. The D.C. Circuit considered the reverse FOIA case to be in the nature of an action for a declaratory judgment that the contested records are within Exemption 4.[85] This issue, which is

(Footnote continued)

Fifth Circuit: Pennzoil v. FPC, 534 F.2d 627 (5th Cir. 1976); *see also* Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975).

Seventh Circuit: Sears, Roebuck & Co. v. Eckerd, No. 77-1417 (7th Cir. Apr. 25, 1978).

Eighth Circuit: General Dynamics Corp. v. Marshall, No. 77-1192 (8th Cir. Feb. 14, 1978).

The Ninth Circuit issued an opinion in Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976) which subsequently was withdrawn.

[83] *See, e.g.,* Planning Research Corp. v. FPC, 555 F.2d 970, 977 (D.C. Cir. 1977) (action arising under FOIA); *see also* Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1380 (D.C. Cir. 1977); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1209-10, 1214 (action arising under 18 U.S.C. § 1905 and FOIA).

Although the Government initially denied jurisdiction in reverse FOIA actions, it now concedes jurisdiction under 28 U.S.C. § 1331. *See* Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1175 (3d Cir. 1977).

[84] 519 F.2d 935 (D.C. Cir. 1975).

[85] *Id.* at 940.

identical whether raised by a requester in an action to compel production of the records or by a submitter in an action to enjoin production, is determined by the court de novo.[86] If the records are within Exemption 4, and the agency nevertheless decides to disclose them, the court must inquire whether the agency abused its discretion. This inquiry is guided by the Administrative Procedure Act (APA) review standards.[87]

The Fourth Circuit, in *Westinghouse Elec. Corp. v. Schlesinger,* [88] agreed that the determination whether records are within Exemption 4 is to be made de novo,[89] but differed on the consequences of exemption. In that court's opinion, an agency's exercise of discretionary power to release exempt records is subject to restraints imposed by declarations of legislative policy against disclosure.[90] In the case of records within Exemption 4, the legislative policy was to insure that such business secrets would not be disclosed, and thus agency discretion to release them is foreclosed.[91] The court also held that 18 U.S.C. § 1905 may be relied upon to bar agency disclosure of confidential business information that is within the scope of that statute.[92]

The Third, Fifth, Seventh and Eighth Circuits[93] hold that a reverse FOIA case is an action for judicial review of agency action governed by the Administrative Procedure Act, for which de novo review is not available. Review is limited to the agency record to determine whether the agency disclosure

[86] *Id.*

[87] *Id.* at 941. The court originally held that disclosure of records covered by 18 U.S.C. § 1905 would be an abuse of discretion *per se, id.* at 942, but later withdrew this opinion and left the question open. Sears, Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir. 1977).

[88] 542 F.2d 1190 (4th Cir. 1976).

[89] *Id.* at 1213.

[90] *Id.* at 1197.

[91] *Id.* at 1211.

[92] *Id.* at 1203.

[93] *See* cases cited note 82, *supra.*

decision is arbitrary, capricious or an abuse of discretion.[94] Under this theory, an agency has the discretion to release records which are within Exemption 4 if it finds that disclosure is in the public interest.[95] Finally, these courts hold that 18 U.S.C. § 1905 does not bar disclosure of business records where release is authorized by an agency regulation.[96]

II.

THE ISSUE OF WHETHER BUSINESS RECORDS ARE WITHIN EXEMPTION 4 MUST BE DETERMINED BY THE COURT DE NOVO

A. De Novo Determination Is an Essential Part of the Congressional Scheme

The availability of a de novo judicial determination of whether records are exempt is a fundamental part of the FOIA scheme. The rationale for Congress' provision of a de novo remedy is equally applicable to Exemption 4 cases whether the issue of exemption is raised in an action to compel disclosure or an action to enjoin it.

Congress strongly believed that an agency determination of whether records are exempt should not be conclusive[97] and therefore expressly provided that in an action to compel the production of agency records "the court shall determine the matter de novo."[98]

> That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and

[94] *See, e.g.,* Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1191-92 (3d Cir. 1977).

[95] *Id.*

[96] *Id.* at 1186-88.

[97] Department of the Air Force v. Rose, 425 U.S. 352, 379 (1976).

[98] 5 U.S.C. § 552(a)(4)(B).

prevent it [sic] from becoming meaningless judicial sanctioning of agency discretion. [99]

The propriety of an agency's classification of records under Exemption 4 involves the same issues in a reverse FOIA case as in an ordinary FOIA action. In cases where suit has been brought to compel production of business records denied by an agency, the submitter has sometimes intervened or assisted the Government by providing testimony or affidavits as to the nature and value of the business information.[100] This evidence is considered by the court de novo. In a reverse FOIA action, the identical issues are presented and the same evidence would be relevant. To ignore this evidence in a reverse FOIA action and apply APA review standards would indeed result in a "meaningless judicial sanctioning of agency discretion," the precise evil Congress intended to avoid in FOIA determinations.

The congressional purpose was to provide de novo review on the *issue* of exemption regardless of who raises it. Any other construction would anomalously produce different results depending solely on whether the submitter or the requester brings the action.

B. The Fallacy of the "Administrative Record"

By limiting the scope of judicial review to the "agency record," the Third Circuit and the other courts that follow this rule have effectively extinguished the protection for business secrets that Congress intended in Exemption 4.

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[99] S. No. 813, 89th Cong., 1st Sess. 8 (1965). *See also* H.R. Rep. No. 1497,*supra* note 46, U.S. Code Cong. & Ad. News at 2426; Note, *The Freedom of Information Act: A 7 Year Assessment,* 74 Colum. L. Rev. 895, 905 (1974).

[100] *See, e.g.,* Government Sales Consultants v. GSA, C.A. No. 77-1294 (D.D.C. filed July 22, 1977). In this action to compel the production of government contract proposals, the bidders who submitted the proposals intervened and filed extensive affidavits demonstrating the sensitive commercial nature of the materials in issue.

Agency FOIA decisions are required by the Act to be made within ten days.[101] Within this time the agency must locate the requested records, review them in detail to determine whether any of the nine exemptions apply, and issue a written determination. It is a practical impossibility for an agency to make an intelligent decision on the propriety of disclosing business records, based on an informed administrative record, within this ten day period.[102]

Exemption 4, under present judicial interpretations, requires a searching analysis of several factual issues. These may include the measures taken by the submitter to guard the confidentiality of his secrets, the existence of competition, the value and usefulness of the business information to competitors, the availability of the information from public sources, and the investment of time, labor and resources expended by the submitter to develop the information.[103]

It is not feasible for agencies to make an intelligent assessment of these factors within ten days.[104] The agencies themselves do not have the information or the expertise upon which to make informed decisions.[105] Consequently, agencies

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[101] 5 U.S.C. § 552(a)(6)(A)(i).

[102] Indeed, in the instant case the court found the agency record so inadequate as to be unreviewable. *See* discussion *infra* note 117. The FOIA permits one extension of time up to ten working days in three specified circumstances, none of which would ordinarily be applicable to a request for business records. 5 U.S.C. § 552(a)(6)(B).

[103] *See, e.g.,* National Parks & Conservation Assn. v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1381-83 (D.C. Cir. 1977).

[104] *See 1977 House FOIA Hearings, supra* note 3, at 4-5; Callman, *supra* note 29, § 58.5 (1977 Supp.); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit,* 55 Tex. L. Rev. 587, 635 (1977).

[105] *See 1977 House FOIA Hearings, supra* note 3, at 5 ("the Agency [EPA] seldom has much information with which to make this

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are compelled often to issue Exemption 4 decisions without adequate information on the justification for confidentiality. The SEC, for example, has admitted that it discloses business records which might warrant confidentiality because the FOIA does not allow sufficient time to consider the issue.[106] The EPA, on the other hand, routinely denies requests for business records for which a non-frivolous claim of confidentiality has been made for the same reason: it cannot, within ten days, assess the merits of exemption.[107]

Since the agency's internal knowledge on Exemption 4 factual matters may be limited, it is essential that the submitter, the party whose rights and interests are directly at stake, and the only person with the detailed factual knowledge of the business records necessary to defend their confidentiality,[108] participate fully in the decisionmaking process.

Nevertheless, the FOIA does not require that notice and an opportunity to participate be accorded the submitter and agency practices vary widely.[109] Even when notice is given, the ten day time limitation for decision precludes any effective participation or opportunity to adduce evidence on behalf of the submitter.[110] Thus the mandatory FOIA time restrictions

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judgment"); Note, *Reverse Freedom of Information Act Suits: Confidential Information In Search Of Protection*, 70 Nw. U. L. Rev. 995, 998-99 (1976); O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Law. 1125, 1134, 1146 (1975). *See also* note 110, *infra*, and accompanying text.

[106] *See* note 72, *supra*.

[107] *See 1977 House FOIA Hearings, supra* note 3, at 4.

[108] *See* authorities cited in notes 104 and 105, *supra*.

[109] *Compare* 41 C.F.R. § 60-40 (1977) *with* 32 C.F.R. App. L. (1976). *See also* note 78 *supra*.

[110] *See*, Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587, 635 (1977) ("Ten days is clearly insufficient to complete the lengthy process of notifica-

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render agency decisions on the exemption for business records inherently inadequate.

Other factors also discredit the integrity of the "administrative record." The agency usually has no direct interest in preserving the confidentiality of private business records, as it would if release of government-produced records were at stake. This lack of interest heightens the FOIA's intentional bias of agency decisionmakers in favor of disclosure. The Act creates a presumption in favor of disclosure [111] and threatens agency officials with sanctions, and the agency itself with assessment of attorney's fees and court costs, for improper refusal to disclose requested records.[112] In fact, the Attorney General, and several agencies in their regulations, require the disclosure of *all* records, even if exempt, unless an *agency* interest will be impaired.[113]

The deficiencies in the agency decisionmaking process were recognized by the Fourth Circuit in *Westinghouse Elec. Corp. v. Schlesinger.* [114] The court rejected the argument that it is "required to render its decision on the administrative record, consisting almost entirely of the agency's *ipse dixit.* . . ." [115]

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tion of submitters, preparation of arguments by submitters, and consideration of these arguments by agencies."); Note, *Protection from Government Disclosure—the Reverse FOIA Suit*, 1976 Duke L.J. 330, 360 ("The Act neither makes provisions nor allows sufficient time, for notification of the party who has submitted the information to the agency of a decision to release the documents"); O'Reilly, *supra* note 104, at 1145 ("The new time limits make effective submitter response impossible without substantial prerequest preparation").

[111] *See* EPA v. Mink, 410 U.S. 73, 79 (1973).

[112] *See* 5 U.S.C. § 552(a)(4)(E); 5 U.S.C. § 552(a)(4)(F).

[113] *See* Attorney General's May 5, 1977 Memorandum on FOIA, *reprinted in 1977 Senate FOIA Hearings, supra* note 17, at 217. The Labor Department regulations at issue in the instant case provide a "blanket waiver" of any authority the Government might have to withhold exempt information. *See* 41 C.F.R. § 60-40.2(a) (1977), Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1177 (3rd Cir. 1977).

[114] 542 F.2d 1190 (4th Cir. 1976).

[115] *Id.* at 1207.

> [T]here is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the competitive position of a supplier of information. That is no part of its responsibility. Neither does it have . . . in most instances, sufficient knowledge to assert properly the private party's right to confidentiality. [116]

The Fourth Circuit's observation is borne out by the fact that in almost every instance in which a court has held that review of a reverse FOIA action should be based on an administrative record, it has also found the administrative record so deficient as to be unreviewable.[117] Since the FOIA itself inherently precludes an agency from compiling an informed "administrative record," the congressional protection intended in Exemption 4 can only be achieved by a de novo proceeding in the District Court.

C. De Novo Review Is Required Under the Administrative Procedure Act

Section 10 of the APA, 5 U.S.C. § 706, provides that review of agency action shall be de novo when agency fact-finding procedures in an adjudicatory action are inadequate. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415 (1971). An agency determination to disclose business

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[116] *Id.* at 1213.

[117] *See, e.g.,* Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1192 (3rd Cir. 1977) ("Our decision to remand this case is based solely on the inadequacy of the administrative record under review"); General Dynamics Corp. v. Marshall, *supra* note 82, slip. op. at 13, n.8 (In the present case . . . the agency record is too ambiguous for the court to comprehend the rationale of the agency's holding"); Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976) ("We feel that [the FPC's] brief statement is inadequate as an articulation of a finding that disclosure of this information serves a legitimate regulatory function"); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595, 602 (N.D. Ohio 1976).

secrets, which may impair or destroy their value, is an adjudicatory action. It has been demonstrated in Part II B, *supra,* that the fact-finding procedures in agency decisionmaking under Exemption 4 are inherently inadequate. Under the APA criteria, therefore, de novo review of the agency disclosure decision is required.

Adjudicatory actions are those in which private property interests would be "exceptionally affected, in each case upon individual grounds" by government action. *Bi- Metallic Inv. Co. v. State Board of Equalization,* 239 U.S. 441, 446 (1915).[118] They are characterized by issues which require resolution of adjudicatory-type facts:

> Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial.[119]

The agency decisionmaking process in Exemption 4 cases is clearly adjudicatory. In *Sears, Roebuck & Co. v. GSA,* [120] the disclosure of EEO-1 reports was in issue. The court observed:

> The question of what this data in the reports would mean to an intelligent competitor is a factual issue. The answer to that issue is in the nature of a fact, a factual conclusion if you prefer, but still partaking of the nature of fact.[121]

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[118] *See also* Londoner v. Denver, 210 U.S. 373, 385-86 (1908).

[119] 1 K. Davis, Administrative Law Treatise § 7.02, at 413 (1958).

[120] 553 F.2d 1378 (1977).

[121] *Id.* at 1382.

In this case Sears claimed that the information in dispute could not be obtained from commercial publications, research services or other government sources, nor could on-site inspections of Sears' retail facilities yield the same type or quality of information. Sears alleged that the information would be of great use to a competitor in determining where to locate future retail stores, and also would reveal "promotable" individuals who could be induced to leave Sears and move to a competitor. The Government contested these factual issues. The court found:

> Where there is a conflict in the affidavits as to what adverse consequences will flow from the revelation of the facts contained in the documents sought to be disclosed, then it appears that there is indeed a conflict regarding very material facts which calls for some type of adversary procedure.[122]

Disputed factual issues regarding the confidentiality of business records will be present in most Exemption 4 cases.[123] The agencies themselves acknowledge that the nature of their inquiry is one which requires resolution of adjudicative facts unique to the business and situation of the submitter in each instance.[124] The adjudicatory nature of the proceeding can hardly be disputed.

The private interests at stake are clearly more than de minimis.[125] Information in reverse FOIA cases often consists of

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[122] *Id.* Similar issues were present and were resolved by the trial court after hearing in the instant case. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1182 (3rd Cir. 1977).

[123] *See, e.g.*, the cases cited in note 82, *supra*.

[124] *See, e.g.*, testimony of EPA in *1977 House FOIA Hearings, supra* note 3, at 4-5.

[125] *See* Goss v. Lopez, 419 U.S. 565, 576 (1975) ("As long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process clause.").

trade secrets and other business information of substantial commercial value.[126] This value may be lost entirely by disclosure.

The lack of agency fact-finding procedures capable of providing a fundamental fair hearing in which to defend the commercial interests at stake has been demonstrated. Accordingly, under 5 U.S.C. § 706, de novo judicial review of agency decisions under Exemption 4 to disclose business records must be provided.

D. The Congressional Purpose of Exemption 4 Requires a Right to a De Novo Determination

Where the right to de novo review of administrative action is not provided expressly by statute, it will nevertheless be implied where this will give effect to the clear legislative intent. In the case of Exemption 4, Congress made it clear that the privacy interest in business secrets is no less important than the general FOIA disclosure policy. The same right to a de novo hearing provided in FOIA disclosure actions therefore must be extended also to actions to preserve confidentiality interests protected by Exemption 4.

In *Chandler v. Roudebush,* 425 U.S. 840 (1976), the Court placed critical reliance upon legislative intent in deciding whether the right to trial de novo statutorily provided to one class of aggrieved persons should be provided to a related class in the absence of an express statutory direction. The issue presented in *Chandler* was whether the Equal Employment

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[126] *See* Kewanee Oil Co. v. Bicron Corp., *supra* note 28; Telex Corp. v. IBM, *supra* note 16; FDA testimony regarding safety and efficacy data for drug applications, *1977 House FOIA Hearings, supra* note 3, at 67-97. The Third Circuit's holding, permitting the impairment or destruction of Chrysler's business secrets without provision of an adjudicatory hearing in an administrative or judicial forum, raises substantial due process questions. *See* cases cited *supra* notes 118 and 125, and the Third Circuit's opinion at 565 F.2d at 1193.

Opportunity Act of 1972 [127] gave federal employees the same right to a trial de novo of employment discrimination claims as "private-sector" employees enjoyed under Title VII of the Civil Rights Act of 1964.[128] The Court found two legislative concerns in the history of the 1972 Act to be dispositive: the inadequacy of available administrative remedies, and the congressional purpose to protect federal employees against employment discrimination.[129] These concerns dictated that the 1972 Act be interpreted to provide federal employees the same right to a trial de novo as had been expressly bestowed on private sector employees.[130]

By analogy, the FOIA expressly provides a right to de novo judicial consideration of a disputed case under Exemption 4 in a civil action to compel disclosure of business records. As in *Chandler,* the legislative history of the FOIA demonstrates that the right to a de novo hearing stemmed from Congress' belief that the administrative remedy itself is inadequate. De novo consideration was provided so that court actions are "prevented from becoming meaningless judicial sanctioning of agency discretion."[131]

Second, as in *Chandler,* the FOIA evinces a legislative purpose to protect the rights of submitters against disclosure of their business secrets.[132] In the face of a statute whose primary objective is disclosure, Congress expressly stated that the protection of privacy rights was of no less importance:

> At the same time that a broad philosophy of "Freedom of Information" is enacted into law, it is necessary to protect certain *equally important rights of privacy* with respect to certain information in Government files. . . . [133]

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[127] Pub. L. 92-261, 86 Stat. 103.

[128] 78 Stat. 253, *as amended,* 42 U.S.C. § 2000(e) *et seq.* (1970 and Supp V 1975).

[129] 425 U.S. at 848-49.

[130] *Id.* at 861.

[131] S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

[132] *See* pp. 15-18, *supra.*

[133] S. Rep. No. 813, *supra* note 131, at 3 (emphasis added).

Since Congress considered an administrative proceeding inadequate for resolution of Exemption 4 issues, and desired to protect privacy rights equally with disclosure rights, the clear legislative purpose requires that the same right to a de novo determination which exists in an action to compel disclosure of business information should be extended to an action to preserve their confidentiality.[134]

III.

BUSINESS SECRETS ADMITTEDLY WITHIN EXEMPTION 4 SHOULD NOT BE DISCLOSABLE AT THE DISCRETION OF AGENCY OFFICIALS

A. Exemption 4 Forecloses Agency Discretion to Disclose Exempt Business Secrets

Exemption 4 embodies a carefully considered congressional policy to protect the privacy of business secrets. As explained in Part I, *supra,* the exemption is an integral part of the web of historical federal and state legal protection for confidential business information, founded upon the belief that such protection will foster innovation, industrial efficiency, and honest commercial practices. To grant agency FOIA officials the

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[134] The Fourth Circuit reached the same conclusion in Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1213 (4th Cir. 1976):

> Should not the person who is threatened with harm through a disclosure, which the Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that right . . . in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier . . . seeks what may be regarded as correlative relief?

discretion, as did the court below, to disclose these business secrets whenever they find it to be "desirable"[135] is to nullify this policy and eviscerate the exemption.

A number of courts have reasoned that since the FOIA "does not apply" to exempt information,[136] the decision whether to disclose them resides in the discretion of the agency, to be reviewed under the APA only for arbitrary or capricious action, or abuse of discretion.[137] The error in this analysis lies in the conclusion that because the FOIA "does not apply" to exempt records, agencies are free to disclose them. In the case of Exemption 4, the contrary is true.

Each FOIA exemption was carefully designed to protect a particular interest in confidentiality. All agency records are presumptively disclosable, but if they fall within an exemption, they are presumptively non-disclosable because they satisfy an interest in confidentiality which Congress concluded outweighs the general interest in disclosure. The Senate Report provides that the Act "sets up workable standards for what records should and should not be open to public inspection."[138] Congress determined that business records which fall within Exemption 4 should not be open to public inspection. Agency discretion to disclose such exempt records is foreclosed, *unless* it is the agency itself which is the intended beneficiary of the exemption.

The person for whose benefit the privacy interest was created may waive the protection if he chooses to do so. The distinction has been drawn between those exemptions which protect agency interests, and those which protect private interests.[139] The exemptions for national security, personnel records, intra and inter-agency memoranda and investigatory records

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[135] Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1178, 1192, (3rd Cir. 1977).

[136] 5 U.S.C. § 552(b).

[137] *See, e.g.*, Chrysler Corp. v. Schlesinger, *supra* note 135, at 1192.

[138] S. Rep. No. 813, *supra* note 131, at 5.

[139] *See* Note, *Developments Under The Freedom of Information Act-1974*, 1975 Duke L.J. 416, 431-32:

> Where the exemption was intended to protect the asserted private interests, an agency should respect the desire of the person submitting the information, and a court, consistent with the overall policy of the FOIA, may order the agency to withhold that information.

Other commentators recognize the distinction between private records and government records. *See* Note, *A Review of the Fourth Exemption of the Freedom of Information Act*, 9 Akron L. Rev. 673, 694 (1976):

> The purpose of the Freedom of Information Act was to protect the people's right to obtain information about their government, to know what their government is doing, and to obtain information about government activities and policies. The Freedom of Information Act was not enacted for the purpose of enabling the public to obtain information about individuals and corporations, about what those individuals and corporations are doing, or about what their activities and policies are. [Footnotes omitted.]

See also O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Law. 1125, 1134 (1975):

> [t]here is a significant policy justification for not 'giving away for free' what private industry, *not Government*, has paid for. Government's duty to reveal *its* inner workings provides no similar justification for the disclosure of private parties' operations. [Emphasis in original.]

protect governmental confidentiality interests.[140] The exemptions for business secrets, personal privacy, financial institutions and geological data were intended to protect private confidentiality interests.[141] An agency may, in its discretion, waive the protection of an exemption intended for its own benefit, but such is not the case with Exemption 4.

In *Westinghouse Elec. Corp. v. Schlesinger,* [142] the court agreed that Congress intended to foreclose agency discretion to reveal business secrets within Exemption 4:

> This provision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests. It was manifestly intended to protect that private interest. And when a statute, whether phrased in the form of an exemption or not, grants a private party protection from disclosure, it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection. It matters not that the statute does not in express terms accord him that right.[143]

B. Agency Officials Should Not Be Permitted to Engage in "Interest Balancing" Where Congress Has Already Performed That Function

The Third Circuit in *Chrysler,* and the other courts which follow this approach, permit agency FOIA officials to disclose

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[140] *See* Exemptions 1, 2, 5 and 7, respectively, 5 U.S.C. §§ 552(b)(1)(2)(5) & (7).

[141] *See* Exemptions 4, 6, 8 and 9, respectively, 5 U.S.C. §§ 552(b)(4), (6), (8) and (9). Exemption 3, 5 U.S.C. § 552(b)(3), may protect both private and governmental confidentiality interests depending upon the particular statute in question.

[142] *Supra* note 88.

[143] *Id.* at 1211 (Emphasis in original).

business secrets found to be within Exemption 4 if, after balancing what they perceive to be the private confidentiality interests against the public interest in disclosure, they deem in their discretion that disclosure is desirable.[144] Permitting agency officials to engage in interest balancing is erroneous, for it ignores the fact that Congress, in defining the scope of the FOIA exemptions, has already balanced the competing public and private interests, and has decided that in the case of business secrets qualifying under Exemption 4, the privacy interests should prevail.

While the purpose of the FOIA was to promote disclosure, Congress recognized that it was equally important to protect certain legitimate interests in confidentiality and privacy.[145] A substantial portion of the congressional effort in drafting the FOIA was consumed with defining those confidentiality interests in the form of the nine exemptions. That process comprehended the balancing of competing interests in confidentiality and disclosure. The Senate Report states:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.[146]

The exemptions themselves embody Congress' policy decisions on how the competing interests in disclosure and confidentiality should be balanced. They provide "workable formulas" which if followed by the agencies will lead to the

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[144] *See* Chrysler Corp. v. Schlesinger, *supra* note 135, at 1192; Charles River Park "A" Inc. v. HUD, *supra* note 84, at 943; Pennzoil Co. v. FPC, *supra* note 82, at 631-32; General Dynamics Corp. v. Marshall, *supra* note 82, slip op. at 12.

[145] *See* S. Rep. No. 813, *supra* note 131, at 3.

[146] *Id.*

proper proportions of disclosure and withholding. Unless provided for specifically in an exemption, there is no place for further "interest balancing" by agency officials once material is found to be within an exemption. This practice can lead only to distortion and circumvention of the deliberate interest balancing already performed by Congress.

In *FAA v. Robertson,* 422 U.S. 255 (1975), the Court discussed the two aspects of the Act. In one, it seeks to open agency records to greater public access; in the other it seeks to preserve "undeniably essential confidentiality." *Id.* at 261. It is axiomatic, the Court declared, that both of these purposes are to be given effect. To give effect to these competing policies, Congress created nine exemptions drafted to provide a "workable and balanced formula" for determining which records should be available to the public and which must be maintained in confidence. *Id.* at 262.[147]

A serious flaw in the reasoning of the Third Circuit lies in the erroneous perception that the public policy favoring protection of business secrets can be given proper effect through a case-by-case approach to interest balancing for each of the thousands of requests for business records under the FOIA. The public policy protecting business secrets is based on the *collective* adverse impact that disclosure of the mass of confidential business information in government files would have

[147] In Westinghouse, *supra* note 88, the court commented:

> In summary, the Act was intended, to use the language of the Senate report, to set 'up workable standards for what records should and should *not* be open to public inspection.' [Emphasis in original.]

542 F.2d at 1211. The court analyzed the balancing performed by Congress in Exemption 4:

> In enacting such exemption, the Congress had balanced the right to public disclosure against the right of the private party to protection and had opted for the right to privacy in favor of the private interest.
>
> *Id.*

on commerce. Considered one item at a time, disclosure of a single company's profits, advertising policies or formulas for the single year or single product in issue may not appear so drastic to an agency FOIA official. Collectively, however, the consequences of numerous such disclosures can be quite significant, yet agency personnel cannot possibly take into account the cumulative impact while focusing on the public interest involved in a single case.[148]

[148] The same policy justification which protects the "deliberative process" under Exemption 5 against piecemeal inquiry into the individualized harm from disclosure of intra or inter-agency memoranda, also is applicable to Exemption 4. The impracticality of assessing harm on a case-by-case basis was pointed out by the FDA general counsel:

> The difficulty we have with the Attorney General's instruction [to withhold information only when disclosure is demonstrably harmful] is that it is very difficult in some cases to make a showing of demonstrable harm, although you know that ultimately some harm may occur. The best example of that I think would be some types of internal agency communications, advice from agency lawyers to the Commissioner, for example.
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> If some asks for those, it might be fery difficult in the particular context of that request to demonstrate harm that would occur if that memo were released. But if one adopted a practice of routinely releasing memorandums from agency lawyers to the Commissioner or other agency personnel to each other, then over a relatively short period of time I think you would find an awful lot of communication taking place on the phone and in person and people being less willing to reduce thoughts, ideas and legal advice to writing.
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> * * *
>
> It is difficult to show harm in a particular case. All you can do is make the general case of harm.

1977 House FOIA Hearings, supra note 3, at 75 (statement of Stuart Pape).

One of the most insidious evils that the FOIA was intended to remedy was the use of the phrase "in the public interest" as a basis for agency decisions to withhold records. Prior to the FOIA, Section 3 of the Administrative Procedure Act, 5 U.S.C. § 1002, permitted withholding of records when secrecy was "in the public interest." This language was considered by Congress to be "full of loopholes" and to present such a "lack of standards" that an agency official could do whatever he wished:[149]

> It would require almost no effort for any official to think up a reason why a piece of information should be withheld . . . because it was in the 'public interest'.[150]

Congress declared, "It is the purpose of the present bill to eliminate such phrases . . .,"[151] because this standard "admits of no clear delineations," "has served in many cases to defeat the very purpose for which it was intended," "has caused widespread public dissatisfaction and confusion,"[152] and was generally so "vague" and "undefinable" as to permit repeated administrative abuse.[153] Indeed, this Court opined in *FAA v. Robertson:* [154]

> The Freedom of Information Act was enacted in order to impose objective and easily applicable statutory disclosure standards in place of relatively amorphous standards such as the 'public interest,' behind which the most self-serving motives for nondisclosure of information could be concealed. [155]

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[149] S. Rep. No. 813, 89th Cong., 1st Sess. at 3, 5.

[150] *Id.*

[151] *Id.* at 3.

[152] *Id.* at 8.

[153] H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), 1966 U.S. Code Cong. & Ad. News 2419, 2422, 2426-27.

[154] 422 U.S. 255 (1975).

[155] *Id.* at 268 (Stuart, J. concurring). *See also* EPA v. Mink, 410 U.S. 73, 79 (1973).

Congress plainly desired to put to rest the phrase "in the public interest" as a device for circumventing disclosure of public records. It is equally clear that Congress did not intend to reactivate this unworkable standard as a basis for circumventing the protections it provided in Exemption 4.

There is a further reason why interest balancing by agency officials is not permitted in Exemption 4 cases. Where Congress intended agency officials to balance competing disclosure and privacy interests in deciding whether to make records public, it indicated this explicitly both in the language of the particular exemption involved and in its legislative history.

Exemption 6, which relates to personnel and medical files, is the only one of the nine exemptions for which Congress permitted interest balancing to determine whether exemption is proper. Exemption 6 protects personnel and medical files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[156] Unlike Exemption 4, the harms from disclosure in Exemption 6 cases can *only* be determined upon a case-by-case interest balancing analysis. The Senate Report provides:

> The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.[157]

Interpreting this exemption, this Court observed:

> Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'

Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

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[156] 5 U.S.C. § 552(b)(6).

[157] S. Rep. No. 813, 89th Cong., 1st Sess. 9.

In stark contrast to the language and legislative history of Exemption 6, Exemption 4 provides no hint that Congress intended agency officials to balance competing interests in determining whether to disclose business secrets. On the contrary, it is clear that Congress provided a formula in Exemption 4 which already balanced those interests in the manner Congress deemed most wise.

Finally, as discussed at length in Part II B *supra,* the inherent statutory limitations on the agency FOIA decisionmaking process effectively preclude agency officials from ascertaining the private interests in business secrecy which are at stake in Exemption 4 cases. The FOIA time restrictions, which deny the submitter a fair opportunity to present evidence, and the statutory bias in favor of disclosure deter the agency official from identifying the strength of the confidentiality interest. It is axiomatic that if the agency cannot properly assess the need for confidentiality, it cannot possibly engage in a meaningful balancing of the competing interests which may be present.

IV.

BUSINESS SECRETS WITHIN 18 U.S.C. § 1905 MAY NOT BE DISCLOSED UNDER THE FOIA

Agency officials are prohibited from disclosing business secrets provided to government agencies by the Trade Secrets Act, 18 U.S.C. § 1905. This statute makes it a crime for an agency employee to disclose, to any extent not authorized by law, any information which relates to, *inter alia:*

> Trade secrets, processes, operations, style or work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person. . . .

In the instant case the District Court held that a portion of the business records in issue were within § 1905, and that since

the Agency's regulations forbade the release of information covered by this statute, these records could not be disclosed. *Chrysler Corp. v. Schlesinger,* 412 F. Supp. 171, 177-78 (D. Del. 1976). The Court of Appeals held that agency disclosure regulations promulgated under the so-called housekeeping statute, 5 U.S.C. § 301, may authorize the disclosure of business secrets admittedly within § 1905.[158]

The Third Circuit's holding permits agencies to avoid the proscriptions of § 1905 simply by passing regulations to that effect, and thus renders the law impotent. Correctly analyzed, § 1905 is a mandatory non-disclosure statute within Exemption 3 of the FOIA, and cannot be circumvented by agency housekeeping regulations under 5 U.S.C. § 301.

A. Section 1905 Is a Statute Within Exemption 3 of the FOIA

In *FAA v. Robertson,* 422 U.S. 255 (1975), the Court, interpreting FOIA Exemption 3, held that the FOIA did not repeal by implication all pre-existing statutes which restricted public access to specific government records. Rather, these nondisclosure statutes were found to be encompassed by Exemption 3. 422 U.S. at 265. Although at that time Exemption 3 provided that records need not be disclosed if specifically exempted from disclosure by statute,[159] the exemption subsequently was amended in a manner which modified the effect of the holding in *Robertson.* [160] The amendment restricted Exemption 3 to matters that are

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular

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[158] 565 F.2d 1172, 1186 (3rd Cir. 1977).
[159] 5 U.S.C. § 552(b)(3) (1970).
[160] *See* H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 25 (1976).

> criteria for withholding or refers to particular types of matters to be withheld.[161]

The purpose of this amendment was to restrict Exemption 3 to statutes in which the concern for secrecy emanated from Congress rather than from the agency.[162]

Although it is necessary to satisfy only one of the two criteria in Exemption 3 as amended, § 1905 satisfies both. Since it is an absolute criminal prohibition, it leaves agencies with no discretion on the issue of whether to withhold the named categories of business secrets. It also establishes particular criteria and types of materials to be withheld, such as trade secrets and information revealing income and profits. There can be no doubt that under either of the new criteria, § 1905 is a statute encompassed by Exemption 3.

B. Agency Regulations May Not Authorize Disclosure of Business Secrets Within Section 1905

The Third Circuit's holding that agency regulations promulgated pursuant to the housekeeping statute, 5 U.S.C. § 301, may authorize disclosure of business secrets admittedly within § 1905, does not withstand analysis.

Section 301 provides in pertinent part:

> The head of an Executive Department or Military Department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

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[161] 5 U.S.C. § 552(b)(3).

[162] Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act,* 76 Colum. L. Rev. 1029, 1042 (1976).

The housekeeping statute, whose antecedents date back to 1789,[163] clearly was not intended to enable agencies to circumvent subsequent specific non-disclosure statutes such as § 1905 by the mere promulgation of regulations to that effect. This is confirmed by the legislative history of the 1958 amendment to the housekeeping statute.

The 1958 amendment added the second sentence of the above quoted portion of § 301. The Senate and House Reports explain that the amendment would not affect other statutes which authorize agencies to withhold information or forbid agencies to disclose information.[164] The sponsor of the amendment, Congressman Moss, stated explicitly that the amendment

> does not go to any other statutory authority which confers upon the departments and agencies of Government the right to withhold information. . . . It does not affect the confidential status of information given to the Government and carefully detailed in title 18, United States Code, section 1905. . . .[165]

The D.C. Circuit, citing this legislative history, specifically agreed that "Section 301 does not authorize regulations limiting the scope of section 1905."[166] Moreover, the legislative history of the FOIA discloses that at the time of its adoption in 1966, agencies considered themselves bound not to disclose

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[163] *See* Act of July 27, 1789, Ch. 4, § 4, 1 Stat. 28; Act of Aug. 7, 1789, Ch. 7, § 4, 1 Stat. 49; Act of April 30, 1798, Ch. 35, § 3, 1 Stat. 553; Act of Sept. 2, 1789, Ch . 12, § 4, 1 Stat. 65. The Act of July 27, 1789 provides in pertinent part:

> [T]he Secretary for the Department of Foreign Affairs . . . shall . . . be entitled to have the custody and charge of all records, books and papers in the Office of the Secretary of the Department of Foreign Affairs. . . .

[164] *See* S. Rep. No. 1621, 85th Cong., 2d Sess. 9 (1958); H.R. Rep. No. 1461, 85th Cong., 2d Sess. 12 (1958).

[165] 104 Cong. Rec. 6550 (1958).

[166] Charles River Park "A", *supra* note 84, at 942-43.

information within the proscription of § 1905, notwithstanding the existence of 5 U.S.C. § 301.[167]

Congress therefore did not intend, through the enactment of this broad statute which permits the heads of agency departments simply to promulgate regulations for the orderly maintenance of their records and property, also to permit them to evade the specific proscriptions against disclosure of business secrets in § 1905.

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[167] *See, e.g., 1964 Senate FOIA Hearings, supra* note 13, at 253 (Department of Commerce comments), 268-71 (Treasury Department comments).

CONCLUSION

The Chamber of Commerce respectfully requests the Court to rule that the Court of Appeals erred in holding that Chrysler's action was confined to review of the agency record; that Chrysler was entitled to a de novo determination as to whether its business records were within FOIA Exemption 4 or 18 U.S.C. § 1905; and that Respondents had no discretion to disclose any portions of Chrysler's business records which the District Court found, after hearing, to be within Exemption 4 or 18 U.S.C. § 1905. The Court is requested to reverse the judgment of the Court of Appeals and to reinstate the permanent injunction entered by the District Court, modified as indicated herein.

Respectfully submitted,

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